14

The only item of income or gain derived or received by the Estate of S. C. McEachern from the collection in 1929 of said installment obligations in the sum of $26,250.00 as described in Paragraph 9 above was the sum of $952,48, representing the discount of 6.348 per cent per annum on said collection for a period of seven and one-half months, [fol. 5] which was the average time elapsed from the date of the death of S. C. McEachern on December 12, 1928, to the dates of collection in 1929.

15

During the year 1929 interest was paid by and on behalf of the Estate of S. C. McEachern in the sum of $2,050.00, which sum represents a proper deduction under Section 23(b) of the Revenue Act of 1928.

16

During the year 1929 state, county and city taxes in the sum of $1,797.17 were paid by and on behalf of the Estate of S. C. McEachern, which sum represents a proper deduction under Section 23(c) of the Revenue Act of 1928.

17

The deductions properly allowable to said Estate of S. C. McEachern for the year 1929 exceeded the items of gross income as described above, and said Estate of S. C. McEachern had no net income subject to income tax for the year 1929.

18

On December 9, 1932, said D. W. McEachern as Administrator of, and on behalf of, said Estate of S. C. McEachern, filed with the Defendant a claim for refund on Treasury Department Form 843, requesting the refund of the amount here sued for and setting forth the facts and reasons upon which this suit is based. The Commissioner of Internal Revenue disallowed said claim for refund on a Schedule dated May 17, 1933, and Plaintiff was advised of said action by the Commissioner in accordance with the provisions of Section 3226 of the Revised Statutes, as amended, by notice sent by the Commissioner by registered mail on May 17, 1933.

[fol. 6] Wherefore, Plaintiff prays that process issue directed to the Defendant requiring him to be and appear at the next term of this Court to answer this petition, and Plaintiff further prays for judgment against the Defendant for the principal sum of $230.07, together with interest thereon at six per cent per annum from December 11, 1930, together with all costs of this proceeding.

Second Count

1

S. C. McEachern died, intestate, on December 12, 1928, a resident of Cobb County, Georgia. On February 4, 1929, the Ordinary of Cobb County, Georgia, granted letters testamentary upon the Estate of said S. C. McEachern to D. W. McEachern, and on the same day said D. W. McEachern qualified as Administrator of the Estate of S. C. McEachern, deceased.

2

Defendant, J. T. Rose, is a citizen of the State of Georgia and is a resident and inhabitant of Fulton County in the Atlanta Division of the Northern District of Georgia, and during the period from December 5, 1921, to June 19, 1933, said Defendant was Collector of Internal Revenue of the United States for the District of Georgia, in which collection district the Plaintiff resides and the Estate of S. C. McEachern is being administered.

3

This is a suit of a civil nature arising under the internal revenue laws of the United States, and in particular the Revenue Act of 1928, being the Act of May 29, 1928, Chapter 852, 45 Stat. 795.

[fol. 7]

4

The Defendant is indebted to the Plaintiff in the principal sum of $1,951.61, with interest at six per cent per annum on $434.62 from March 16, 1931, on $434.62 from June 11, 1931, on $434.62 from September 11, 1931, on $647.75 from December 15, 1931, by reason of the facts set forth in the following paragraphs.

5

During the month of March 1931, the Commissioner of Internal Revenue assessed against the Estate of S. C. McEachern income taxes for the calendar year 1930 in the sum of $1,951.61.

6

Defendant collected from Plaintiff the full amount of said assessment in the following installments, on the dates indicated:

$434.62 on March 16, 1931
434.62 on June 11, 1931
434.62 on September 11, 1931
647.75 on December 15, 1931

7

The only items of gross income as defined in Section 22 of the Revenue Act of 1928 received by or on behalf of said Estate of S. C. McEachern in the year 1930 were (a) an item of rents received and (b) an item of gain derived upon the collection of certain installments of the selling price of stock in the Industrial Life & Health Insurance Company, both of which items will be more fully described below.

8

The items of rents referred to in the preceding paragraph amounted to $995.06.

[fol. 8]

9

The installments of the selling price of stock in Industrial Life & Health Insurance Company referred to in Paragraph 7 were received by the Estate of S. C. McEachern in the year 1930 in the sum of $33,750.00, pursuant to a contract for the sale of 500 shares of said stock, which the said S. C. McEachern, Plaintiff's intestate, had entered into on September 3, 1924. A copy of said contract is attached hereto and made a part hereof, marked Exhibit A.

10

Under said contract of sale (Exhibit A), the said S. C. McEachern undertook to sell said 500 shares of stock in Industrial Life & Health Insurance Company for a total

consideration of $300,000.00, payable $30,000.00 in cash at the time of said contract and the balance in installments of $7,500.00, the first being due March 1, 1925, and the other installments being due every three months thereafter.

11

At the time of the death of said S. C. McEachern on December 11, 1928, there remained unpaid under said contract remaining installments in the total sum of $150,000.00, which was due as follows: Installments of $7,500.00 each due respectively on the first day of March, 1929, and on the first day of each third month thereafter, the last payment being due December 1, 1933.

12

The unpaid and uncollected installment obligations in the sum of $150,000.00, as described in Paragraph 11, outstanding at the date of the death of S. C. McEachern, were treated as an asset of said S. C. McEachern for Federal estate tax purposes and were included under Schedule C [fol. 9] of the Federal estate tax return filed on behalf of the Estate of S. C. McEachern at a value of $125,000.00.

13

The value of $125,000.00, at which said S. C. McEachern's interest in said unpaid and uncollected installment obligations at the time of his death was returned for estate tax purposes, was determined by deducting from the face amount of the then future installment payments a discount of approximately 6.348 per cent per annum from the date of the death of S. C. McEachern to the average due date of the installments.

14

The only item of income or gain derived or received by the Estate of S. C. McEachern from the collection in 1930 of said installment obligations in the sum of $33,750.00 as described in Paragraph 9 above was the sum of $3,333.32, representing the discount of 6.348 per cent per annum on said collection for a period of nineteen and one-half months, which was the average time elapsed from the date of the death of S. C. McEachern on December 12, 1928, to the dates of collection in 1930.

15

During the year 1930 interest was paid by and on behalf of the Estate of S. C. McEachern in the sum of $1,920.00, which sum represents a proper deduction under Section 23(b) of the Revenue Act of 1928.

16

During the year 1930 state, county and city taxes in the sum of $980.00 were paid by and on behalf of the Estate of S. C. McEachern, which sum represents a proper deduction under Section 23(c) of the Revenue Act of 1928.

[fol. 10] 17

During the year 1930 debts owing to said Estate of S. C. McEachern were ascertained to be worthless and charged off by the Plaintiff in the sum of $1,389.79, which sum consitutes a proper deduction under Section 23(j) of the Revenue Act of 1928.

18

The items of gross income received by said Estate of S. C. McEachern in the year 1930 exceeded the deductions properly allowable to said Estate by the sum of $38.59, which sum represents the net income of said Estate of S. C. McEachern for the year 1930 within the meaning of Section 21 of the Revenue Act of 1928. Said sum of $38.59 was offset by the exemption of $1,500.00 allowable to said Estate by Section 163 of the Revenue Act of 1928.

19

On December 9, 1932, said D. W. McEachern as Administrator of, and on behalf of, said Estate of S. C. McEachern, filed with the Defendant a claim for refund on Treasury Department Form 843, requesting the refund of the amount here sued for and setting forth facts and reasons upon which this suit is based. The Commissioner of Internal Revenue disallowed said claim for refund on a Schedule dated May 17, 1933, and Plaintiff was advised of said action by the Commissioner in accordance with the provisions of Section 3226 of the Revised Statutes, as amended, by notice sent by the Commissioner by registered mail on May 17, 1933.

Wherefore, Plaintiff prays that process issue directed to the Defendant requiring him to be and appear at the next term of this Court to answer this petition, and Plaintiff further prays for judgment against the Defendant for the principal sum of $1,951.61 with interest at six per cent per annum, as provided by law, on $434.62 from March 16, [fol. 11] 1931, on $434.62 from June 11, 1931, on $434.62 from September 11, 1931, and on $647.75 from December 15, 1931, together with all costs of this proceeding.

Third Count

1

S. C. McEachern died intestate on December 12, 1928, a resident of Cobb County, Georgia. On February 4, 1929, the Ordinary of Cobb County, Georgia, granted letters testamentary upon the Estate of said S. C. McEachern to D. W. McEachern, and on the same day said D. W. McEachern qualified as Administrator of the Estate of S. C. McEachern, deceased.

2

Defendant, J. T. Rose, is a citizen of the State of Georgia and is a resident and inhabitant of Fulton County in the Atlanta Division of the Northern District of Georgia, and during the period from December 5, 1921, to June 19, 1933, said Defendant was Collector of Internal Revenue of the United States for the District of Georgia, in which collection district the Plaintiff resides and the Estate of S. C. McEachern is being administered.

3

This is a suit of a civil nature arising under the internal revenue laws of the United States, and in particular the Revenue Act of 1928, being the Act of May 29, 1928, Chapter 852, 45 Stat. 795.

4

The Defendant is indebted to the Plaintiff in the principal sum of $1,676.66 with interest at six per cent per annum on $401.20 from March 15, 1932, on $416.65 from [fol. 12] June 17, 1932, on $416.65 from September 15, 1932, on $441.16 from May 31, 1933, and on $1.00 from June 8,

1933, by reason of the facts set forth in the following paragraphs.

5

During the month of March, 1932, the Commissioner of Internal Revenue assessed against the Estate of S. C. McEachern income taxes for the calendar year 1931 in the sum of $1,666.57.

6

Defendant collected from Plaintiff the full amount of said assessment in the following installments, on the dates indicated:

$416.65 on March 15, 1932
416.65 on June 17, 1932
416.65 on September 15, 1932
416.62 on May 31, 1933

7

On May 31, 1933, the Defendant collected from Plaintiff interest in the sum of $24.54 on the last installment of principal referred to in Paragraph 6, namely, the installment of $416.62 collected on May 31, 1933.

8

On June 8, 1933, the Defendant collected from Plaintiff interest in the sum of $1.00 on the last installment of principal referred to in Paragraph 6, namely, the installment of $416.62 collected on May 31, 1933.

9

The only items of gross income as defined in Section 22 of the Revenue Act of 1928 received by or on behalf of said Estate of S. C. McEachern in the year 1931 were (a) an [fol. 13] item of rents received and (b) an item of gain derived upon the collection of certain installments of the selling price of stock in the Industrial Life & Health Insurance Company, both of which items will be more fully described below.

10

The item of rents referred to in the preceding paragraph amounted to $248.54.

11

The installments of the selling price of stock in Industrial Life & Health Insurance Company referred to in Paragraph 9 were received by the Estate of S. C. McEachern in the year 1931 in the sum of $30,000.00, pursuant to a contract for the sale of 500 shares of said stock, which the said S. C. McEachern, Plaintiff's intestate, had entered into on September 3, 1924. A copy of said contract is attached hereto and made a part hereof, marked Exhibit A.

12

Under said contract of sale (Exhibit A), the said S. C. McEachern undertook to sell 500 shares of stock in Industrial Life & Health Insurance Company for a total consideration of $300,000.00, payable $30,000.00 in cash at the time of said contract and the balance in installments of $7,500.00, the first being due March 1, 1925, and the other installments being due three months thereafter.

13

At the time of the death of said S. C. McEachern on December 11, 1928, there remained unpaid under said contract remaining installments in the total sum of $150,000.00, which was due as follows: Installments of $7,500.00 each due respectively on the first day of March 1929, and on the [fol. 14] first day of each third month thereafter, the last payment being due December 1, 1933.

14

The unpaid and uncollected installment obligations in the sum of $150,000.00, as described in Paragraph 13, outstanding at the date of the death of S. C. McEachern, were treated as an asset of said S. C. McEachern for Federal estate tax purposes and were included under Schedule C of the Federal estate tax return filed on behalf of the Estate of S. C. McEachern at a value of $125,000.00.

15

The value of $125,000.00, at which said S. C. McEachern's interest in said unpaid and uncollected installment obligations at the time of his death was returned for estate tax purposes, was determined by deducting from the face

amount of the then future installment payments a discount of approximately 6.348 per cent per annum from the date of the death of S. C. McEachern to the average due date of the installments.

16

The only item of income or gain derived or received by the Estate of S. C. McEachern from the collection in 1931 of said installment obligations in the sum of $30,000.00 as described in Paragraph 11 above was the sum of $4,999.95, representing the discount of 6.348 per cent per annum on said collection for a period of thirty-one and one-half months, which was the average time elapsed from the date of the death of S. C. McEachern on December 12, 1928, to the dates of collection in 1931.

17

During the year 1931 interest was paid by and on behalf of the Estate of S. C. McEachern in the sum of $1,220.00, [fol. 15] which sum represents a proper deduction under Section 23(b) of the Revenue Act of 1928.

18

During the year 1931, state, county and city taxes in the sum of $898.71 were paid by and on behalf of the Estate of S. C. McEachern, which sum represents a proper deduction under Section 23(c) of the Revenue Act of 1928.

19

During the year 1931 said Estate of S. C. McEachern suffered and sustained a loss of property to the extent of $100.00, arising from the burglary of a store belonging to said Estate, which said loss was not compensated for by insurance or otherwise, and which said amount constitutes a proper deduction under Section 23(e) of the Revenue Act of 1928.

20

The items of gross income received by said Estate of S. C. McEachern in the year 1931 exceeded the deductions properly allowable to said Estate by the sum of $2,529.79, which sum represents the net income of said Estate of S. C. McEachern for the year 1931 within the meaning of Section 21 of the Revenue Act of 1928. Said sum of $2,529.79 was

subject to the exemption of $1,500.00 allowed by Section 163 of the Revenue Act of 1928 for normal tax purposes, and the remaining $1,029.79 was subject to normal tax at the rate of one and one-half per cent, or a total normal tax of $15.45.

21

On December 9, 1932, said D. W. McEachern as Administrator of, and on behalf of, said Estate of S. C. McEachern, filed with the Defendant a claim for refund on Treasury [fol. 16] Department Form 843, requesting the refund of the amount here sued for and setting forth the facts and reasons upon which this suit is based. The Commissioner of Internal Revenue disallowed said claim for refund on a Schedule dated May 17, 1933, and Plaintiff was advised of said action by the Commissioner in accordance with the provisions of Section 3226 of the Revised Statutes, as amended, by notice sent by the Commissioner by registered mail on May 17, 1933.

Wherefore, Plaintiff prays that process issue directed to the Defendant requiring him to be and appear at the next term of this Court to answer this petition, and Plaintiff further prays for judgment against the Defendant for the principal sum of $1,676.66, together with interest at six per cent per annum on $401.20 from March 15, 1932, on $416.65 from June 17, 1932, on $416.65 from September 15, 1932, on $441.16 from May 31, 1933, and on $1.00 from June 8, 1933, together with all costs of this proceeding.

Blair & Gardner, Sutherland, Tuttle & Brennan, Attorneys for Plaintiff.

EXHIBIT "A" TO PETITION

GEORGIA,
Fulton County:

This Contract and Agreement, made and entered into on this the 3rd day of September, 1924, by and between J. N. McEachern, Sr., of the County of Fulton and State of Georgia, party of the first part, and S. C. McEachern, of the County of Cobb County and State of Georgia, party of the second part, Witnesseth:

1. That for value received, the party of the first part does hereby agree to pay to the party of the second part, his heirs

[fol. 17] and assigns, the sum of Three Hundred Thousand & No/100 ($300,000.00) Dollars; said sum payable as follows: Thirty Thousand and No/100 ($30,000.00) Dollars, cash, this day paid, the receipt whereof is hereby acknowledged, and the balance of Two Hundred and Seventy Thousand & No/100 ($270,000.00) Dollars in installments as follows; Seventy-five Hundred & No/100 ($7,500) Dollars on the first day of March, 1925, and a like sum of $7,500.00 on the first day of each and every third month thereafter until the full balance of $270,000.00 is fully paid; said installments shall bear no interest before maturity, but after maturity said installments shall bear interest at the rate of 8% per annum until paid.

2. As a part of the consideration of the payment of said sums of money, as aforesaid, the party of the second part does hereby agree to sell and transfer to the party of the first part his heirs, or assigns, the five hundred (500) shares of the capital stock of the Industrial Life & Health Insurance Company now owned by the party of the second part.

3. The agreement of the party of the second part to sell and transfer said stock is to be construed as a conditional agreement of sale, to become absolute upon the full payment of the said sum of $300,000.00, according to the tenor and effect of this instrument. As a part of the consideration of the payment of said sum of money by the party of the first part, the party of the second part agrees to resign as Vice-President and as a Director of the Industrial Life & Health Insurance Company, and that his salary as such Vice-President and Director shall cease from the date hereof. The party of the second part has endorsed the certificates of his said shares of stock in blank, and has deposited the same with the party of the first part, and the party of the first part acknowledges the receipt of said certificates of stock, and agrees to hold the same in trust until the several [fol. 18] sums of money herein agreed to be paid by the party of the first part shall have been fully made. Said stock shall not be transferred on the books of the company until the payments herein agreed to be made by the party of the first part have been fully and completely made, but the party of the first part shall have the right to receive all dividends which may be declared and paid on said shares of stock as long as the party of the first part is not in default in the making of the payments herein agreed to be made.

4. Should the party of the first part, or his heirs or assigns make default in any of the above payments, and should said default continue for a period of ninety days, then said shares of stock shall be on demand returned to the party of the second part, and this agreement cancelled, and the party of the second part shall be restored to all of his rights as owner of said shares of stock and any payments which the party of the first part, or his heirs or assigns, may have theretofore paid, shall be forfeited to the party of the second part in consideration of his loss of salary as an officer and director of the company and of the dividends which he would or might have drawn as a stockholder prior to such forfeiture.

In Witness Whereof, the parties hereto have hereunto set their hands and affixed their seals, in duplicate, the day and year first above written.

Signed, sealed and delivered in the presence of: Mrs. J. M. Byrd, H. T. Dobbs, Notary Public. (Seal embossed.) J. N. McEachern, Party of the First Part. (Seal.) S. C. McEachern, Party of the Second Part.

NOTE.—Summons omitted.

[File endorsement omitted.]

[fol. 19] IN UNITED STATES DISTRICT COURT

ANSWER—Filed March 9, 1935

To the District Court of the United States for the Northern District of Georgia, Atlanta Division:

Now comes the defendant and answers the petition on file as follows:

For a First Defense to the First Count

1. Admits the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, 10, 11, 15, 16 and 18.

2. Denies the allegations of paragraphs 7, 12, 14 and 17.

3. Denies that the defendant is indebted to the plaintiff in the principal sum of $230.07, together with interest at

6% per annum from December 11, 1930, as alleged in paragraph 4, or in any other sum.

4. Denies the allegations of paragraph 13 and further answering says that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal estate tax liability of the estate of S. C. McEachern, deceased, neither operates to preclude correct action as to the issues herein involved nor as an admission against this defendant or upon his behalf.

For a Second Defense to the First Count

For a further and second defense to the first count of the petition herein the defendant alleges:

[fol. 20] 1. That S. C. McEachern, the decedent, in his lifetime elected to and did report a gain from the sale, which is described in Exhibit "A" of the petition herein, on the installment basis for the years 1924, 1925, 1926 and 1927 and paid the taxes due thereon.

2. That in the income tax return filed for the decedent, S. C. McEachern, for the year 1928 and in the income tax returns filed for the estate of S. C. McEachern for the years 1929, 1930 and 1931, the plaintiff, with full knowledge of the said decedent's election as set out in paragraph immediately preceding, continued the practice of the decedent by reporting in each of those returns the sale of 50 shares of stock in each year as separate sales thereof.

3. That in the income tax return filed for the decedent for the year 1928 the plaintiff failed to report the fact that an installment obligation existed and to thereby give the Commissioner an opportunity to assess and collect from the estate a tax upon the gain resulting from the transmission thereof by the decedent to the estate under Section 44(d) of the Revenue Act of 1928.

4. That after the assessment of the tax on the gain resulting under Section 44(d) of the Revenue Act of 1928 had become barred by the statute of limitations, the plaintiff filed his claims for refund for the years 1929, 1930 and 1931 therein showing that the stock reported sold in each of said years involved an installment obligation and alleging that the income of the estate and the taxes thereon for the years 1929, 1930 and 1931 were overstated in the returns

as filed for said years, because instead of using the cost to the decedent as the basis for the stock reported sold in said years, the basis should have been the fair market value of the stock at the date of the death of the decedent, the grounds set out in said claims for refund being the grounds which form the basis of this suit.

[fol. 21] 5. That in claiming refunds based on the alleged erroneous returns for 1929, 1930 and 1931 no offer was made to file an amended return for the decedent for 1928 or to pay the tax for that year which should have been paid by the estate on any gain resulting under Section 44(d) of the Revenue Act of 1928.

6. That in view of the conduct of the plaintiff in making the income tax return for the decedent for the year 1928 and in making his tax returns for the years 1929, 1930 and 1931, respectively, in the form and manner as hereinabove alleged and inducing the defendant to accept the same and in accepting the benefits derived therefrom and in view of the acts of the Commissioner in relying in good faith upon and accepting plaintiff's said sworn tax returns as aforesaid for these four years as correct so far as the items of income involved herein are concerned, it would be unconscionable for the plaintiff to be allowed any recovery from the defendant as an overpayment of its 1929 income tax upon the theory that a different basis should be used in determining the gain in connection with the sums collected during the year 1929 under the contract set out as Exhibit "A" of the petition, and thereby leave the defendant without any existing available remedy to enforce collection from the plaintiff of tax that would be due for the year 1928 under the theory which the plaintiff now seeks to advance.

7. That the defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on plaintiff's position and representation in respect of the manner and method of reporting the income of said estate for the calendar year 1928, and the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any tax from plaintiff for said year computed upon the basis which plaintiff now contends is the correct basis for computing said tax liability, and plaintiff is estopped to assert and claim that any [fol. 22] portion of the taxes in controversy in this action

were not taxable to said estate while receiving the benefit resulting from the inability of the United States to collect a tax computed upon what plaintiff now contends is the correct basis.

8. That, by reason of the foregoing, defendant avers that plaintiff is now estopped from changing (for the purpose of recovering from defendant in this action) the position taken in his own sworn tax return for the year 1929 as aforesaid, and said matter of estoppel in pais is expressly relied upon by the defendant and is here placed in bar of plaintiff's recovery in this action of any amount as an overpayment of plaintiff's 1929 tax.

For a First Defense to the Second Count

1. Admits the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, 10, 11, 15, 16, 17 and 19.

2. Denies the allegations of paragraphs 7, 12 and 14.

3. Denies that the defendant is indebted to the plaintiff in the principal sum of $1,951.61, with interest at six per cent per annum on $434.62 from March 16, 1931, on $434.62 from June 11, 1931, on $434.62 from September 11, 1931, on $647.75 from December 15, 1931, as alleged in paragraph 4, or in any other sum.

4. Denies the allegation of paragraph 18 that $38.59 is the correct amount which the gross income received by the estate of S. C. McEachern for the year 1930 exceeded the deductions properly allowable to said estate in the year 1930, and further denies that the net income for the year 1930 was offset by the allowable exception as alleged in said paragraph.

[fol. 23] 5. Denies the allegations of paragraph 13 and further answering says that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal estate tax liability of the estate of S. C. McEachern, deceased, neither operates to preclude correct action as to the issues herein involved nor as an admission against this defendant or upon his behalf.

For a Second Defense to the Second Count

For a further and second defense to the second count of the petition herein the defendant alleges:

1. That S. C. McEachern, the decedent, in his lifetime elected to and did report a gain from the sale, which is described in Exhibit "A" of the petition herein, on the installment basis for the years 1924, 1925, 1926 and 1927 and paid the taxes due thereon.

2. That in the income tax return filed for the decedent, S. C. McEachern, for the year 1928 and in the income tax returns filed for the estate of said S. C. McEachern for the years 1929, 1930 and 1931, the plaintiff, with full knowledge of the said decedent's election as set out in the paragraph immediately preceding, continued the practice of the decedent by reporting in each of those returns the sale of 50 shares of stock in each year as separate sales thereof.

3. That in the income tax return filed for the decedent for the year 1928 the plaintiff failed to report the fact that an installment obligation existed and to thereby give the Commissioner an opportunity to assess and collect from the estate a tax upon the gain resulting from the transmission thereof by the decedent to the estate under Section 44(d) of the Revenue Act of 1928.

[fol. 24] 4. That after the assessment of the tax on the gain resulting under Section 44(d) of the Revenue Act of 1928 had become barred by the statute of limitations, the plaintiff filed his claims for refund for the years 1929, 1930 and 1931 therein showing that the stock reported sold in each of said years involved an installment obligation and alleging that the income of the estate and the taxes thereon for the years 1929, 1930 and 1931 were overstated in the returns as filed for said years, because instead of using the cost to the decedent as the basis for the stock reported sold in said years, the basis should have been the fair market value of the stock at the date of the death of the decedent, the grounds set out in said claims for refund being the grounds which form the basis of this suit.

5. That in claiming refunds based on the alleged erroneous returns for 1929, 1930 and 1931 no offer was made to file an amended return for the decedent for 1928 or to pay the tax for that year which should have been paid by the estate on any gain resulting under Section 44(d) of the Revenue Act of 1928.

6. That in view of the conduct of the plaintiff in making the income tax return for the decedent for the year 1928

and in making his tax returns for the years 1929, 1930 and 1931, respectively, in the form and manner as hereinabove alleged and inducing the defendant to accept the same and in accepting the benefits derived therefrom and in view of the acts of the Commissioner in relying in good faith upon and accepting plaintiff's said sworn tax returns as aforesaid for these four years as correct so far as the items of income involved herein are concerned, it would be unconscionable for the plaintiff to be allowed any recovery from the defendant as an overpayment of its 1930 income tax upon the theory that a different basis should be used in determining the gain in connection with the sums collected during the year 1930 under the contract set out as Exhibit [fol. 25] "A" of the petition, and thereby leave the defendant without any existing available remedy to enforce collection from the plaintiff of tax that would be due for the year 1928 under the theory which the plaintiff now seeks to advance.

7. That the defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on plaintiff's position and representation in respect of the manner and method of reporting the income of said estate for the calendar year, and the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any tax from plaintiff for said year computed upon the basis which plaintiff now contends is the correct basis for computing said tax liability, and plaintiff is estopped to assert and claim that any portion of the taxes in controversy in this action were not taxable to said estate while receiving the benefit resulting from the inability of the United States to collect a tax computed upon what plaintiff now contends is the correct basis.

8. That, by reason of the foregoing, defendant avers that plaintiff is now estopped from changing (for the purpose of recovering from defendant in this action) the position taken in his own sworn tax return for the year 1930 as aforesaid, and said matter of estoppel in pais is expressly relied upon by the defendant and is here pleaded in bar of plaintiff's recovery in this action of any amount as an overpayment of plaintiff's 1930 income tax.

For a First Defense to the Third Count

1. Admits the allegations of paragraphs 1, 2, 3, 5, 10, 11, 12, 13, 17, 18, 19 and 21.

[fol. 26] 2. Denies the allegations of paragraphs 9, 14 and 16.

3. Denies that the defendant is indebted to the plaintiff in the principal sum of $1,676.66, with interest at six per cent per annum on $401.20 from March 15, 1932, on $416.65 from June 17, 1932, on $416.65 from September 15, 1932, on $441.18 from May 31, 1933, and on $1.00 from June 8, 1933, as alleged in paragraph 4, or in any other sum.

4. Denies that the last installment referred to in paragraph 6 was paid on May 31, 1933, and alleges that said installment was paid on June 7, 1933. Admits the remainder of paragraph 6.

5. Denies the allegations of paragraph 7 that May 31, 1933, was the date on which the defendant collected from the plaintiff interest in the sum of $24.54 on the last installment of principal referred to in paragraph 6 of the petition and alleges that said collection was made on June 7, 1933. Denies the further allegation of paragraph 7 that the installment of $416.62 therein referred to was collected on May 31, 1933, and alleges that said collection was made on June 7, 1933.

6. Denies the allegation of paragraph 8 that June 8, 1933, was the date of the interest collection referred to in said paragraph and further denies that May 31, 1933, was the date of the installment collection therein referred to and alleges that June 12, 1933, was the date of said interest collection and that June 7, 1933, was the date of said installment collection.

7. Denies the allegations of paragraph 15 and further answering says that any action which may have been taken by the Commissioner of Internal Revenue in respect to the Federal estate tax liability of the estate of S. C. McEachern, deceased, neither operates to preclude correct [fol. 27] action as the issues herein involved nor as an admission against this defendant or upon his behalf.

8. Denies the allegation of paragraph 20 that $2,529.79 is the correct amount which the gross income received by

the estate of S. C. McEachern in the year 1931 exceeded the deductions properly allowable to said estate in the year 1931, and denies that after the deduction of the permitted exemption from the net income of said year that the sum of $1,029.79 was the correct amount subject to normal tax at the rate of 1½% and further denies that the total normal tax for said year was $15.45.

For a Second Defense to the Third Count

For a further and second defense to the third count of the petition herein the defendant alleges:

1. That S. C. McEachern, the decedent, in his lifetime elected to and did report a gain from the sale, which is described in Exhibit "A" of the petition herein, on the installment basis for the years 1924, 1925, 1926 and 1927 and paid the taxes due thereon.

2. That in the income tax return filed for the decedent, S. C. McEachern, for the year 1928 and in the income tax returns filed for the estate of said S. C. McEachern for the years 1929, 1930 and 1931, the plaintiff with full knowledge of the said decedent's election as set out in the paragraph immediately preceding, continued the practice of the decedent by reporting in each of those returns the sale of 50 shares of stock in each year as separate sales thereof.

3. That in the income tax return filed for the decedent for the year 1928 the plaintiff failed to report the fact that [fol. 28] an installment obligation existed and to thereby give the Commissioner an opportunity to assess and collect from the estate a tax upon the gain resulting from the transmission thereof by the decedent to the estate under Section 44(d) of the Revenue Act of 1928.

4. That after the assessment of the tax on the gain resulting under Section 44(d) of the Revenue Act of 1928 had become barred by the statute of limitations, the plaintiff filed his claims for refund for the years 1929, 1930 and 1931 therein showing that the stock reported sold in each of said years involved an installment obligation and alleging that the income of the estate and the taxes thereon for the years 1929, 1930 and 1931 were overstated in the returns as filed for said years, because instead of using the

cost to the decedent as the basis for the stock reported sold in said years, the basis should have been the fair market value of the stock at the date of the death of the decedent, the grounds set out in said claims for refund being the grounds which form the basis of this suit.

5. That in claiming refunds based on the alleged erroneous returns for 1929, 1930 and 1931 no offer was made to file an amended return for the decedent for 1928 or to pay the tax for that year which should have been paid by the estate on any gain resulting under Section 44(d) of the Revenue Act of 1928.

6. That in view of the conduct of the plaintiff in making the income tax return for the decedent for the year 1928 and in making his tax returns for the years 1929, 1930 and 1931, respectively, in the form and manner as hereinabove alleged and inducing the defendant to accept the same and in accepting the benefits derived therefrom and in view of the acts of the Commissioner in relying in good faith upon and accepting plaintiff's said sworn tax returns as aforesaid for these four years as correct so far [fol. 29] as the items of income herein are concerned, it would be unconscionable for the plaintiff to be allowed any recovery from the defendant as an overpayment of its 1931 income tax upon the theory that a different basis should be used in determining the gain in connection with the sums collected during the year 1931 under the contract set out as Exhibit "A" of the petition, and thereby leave the defendant without any existing available remedy to enforce collection from the plaintiff of tax that would be due for the year 1928 under the theory which the plaintiff now seeks to advance.

7. That the defendant, the Commissioner of Internal Revenue and the United States relied to their prejudice on plaintiff's position and representation in respect of the manner and method of reporting the income of said estate for the calendar year 1928, and the Commissioner of Internal Revenue and the United States are now precluded from assessing and collecting any tax from plaintiff for said year computed upon the basis which plaintiff now contends is the correct basis for computing said tax liability, and plaintiff is estopped to assert and claim that any portion of the taxes in controversy in this action

were not taxable to said estate while receiving the benefit resulting from the inability of the United States to collect a tax computed upon what plaintiff now contends is the correct basis.

8. That, by reason of the foregoing, defendant avers that plaintiff is now estopped from changing (for the purpose of recovering from defendant in this action) the position taken in his own sworn tax return for the year 1931 as aforesaid, and said matter of estoppel in pais is expressly relied upon by the defendant and is here pleaded in bar of plaintiff's recovery in this action of any amount as an overpayment of plaintiff's income tax.

[fol. 30] Wherefore, defendant prays that the petition be dismissed with costs.

Lawrence S. Camp, United States Attorney; M. Neil Andrews, Asst. U. S. Attorney, Attorneys for the Defendant.

Duly sworn to by J. T. Rose. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

MOTION FOR DIRECTED VERDICT—Filed April 10, 1935

Now comes the defendant by its Counsel in open Court immediately after the close of all the evidence in the case and moves the Court for a directed verdict in his favor for the following reasons:

[fol. 31] 1. That the pleadings and the evidence are legally insufficient to support any judgment in favor of the plaintiff in the cause.

2. That under the pleadings and the evidence, the plaintiff is estopped to asserting a claim that any portion of the taxes in controversy in this action were not taxable to the estate of S. C. McEachern.

M. Neil Andrews, Assistant United States Attorney; Edward P. Hodges, Special Assistant to the Attorney General, and —— ——, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

VERDICT

We, the jury, find for the Plaintiff in the principal sum of $3858.34, with interest at six per cent per annum as provided by law on $230.07 from December 11, 1930, on $434.62 from March 16, 1931, $434.62 from June 11, 1931, on $434.62 from September 11, 1931, on $647.75 from December 15, 1931, on $401.20 from March 15, 1932, on $416.65 from June 17, 1932, on $416.65 from September 15, 1932, on $442.16 from June 12, 1933.

April 11, 1935.

A. E. Wheeler, Foreman.

[fol. 32] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed April 11, 1935

This case having come on for trial before the Honorable William H. Barrett, United States Judge, and a jury, on April 10, 1935, and the jury having rendered a verdict for Plaintiff on the direction of the Court, it is hereby ordered, adjudged and decreed that the Plaintiff do have and recover from the Defendant the principal sum of $3,858.34, together with interest, as provided by Section 615 of the Revenue Act of 1928, at 6% per annum, from the date of overpayment, to-wit: On $230.07 from December 11, 1930, on $434.62 from March 16, 1931, on $434.62 from June 11, 1931, on $434.62 from September 11, 1931, on $647.75 from December 15, 1931, on $401.20 from March 15, 1932, on $416.65 from June 17, 1932, on $416.65 from September 15, 1932, and on $442.16 from June 12, 1933, together with costs of this proceeding, to-wit, $—.

This 11th day of April, 1935.

Wm. H. Barrett, United States Judge, Designated.

Joseph B. Brennan, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed August 28, 1935

Be it remembered that on the 10th day of April, 1935, at a regular term of the United States District Court for the

Northern District of Georgia, Atlanta Division, begun and held in the City of Atlanta, the above-entitled cause came on to be tried before the Honorable William H. Barrett, United [fol. 33] States Judge Designate presiding, and a jury. The following appearances were noted: Messrs. Sutherland, Tuttle and Brennan, for the plaintiff; Lawrence S. Camp, United States Attorney, Edward P. Hodges, Special Assistant to the Attorney General, and William B. Waldo, Special Assistant to the Attorney General, for the defendant, when the following proceedings were had, to-wit:

The court being duly organized, the above-entitled case was called for trial and a jury was duly impaneled and sworn.

OFFERS IN EVIDENCE

Plaintiff introduced the following documentary evidence: Income tax returns for 1929, 1930 and 1931, as follows:

Individual Income Tax Return

For Net Incomes from Salaries or Wages of More Than $5,000 and Incomes from Business, Profession, Rents, or Sale of Property

For Calendar Year 1929

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1930.

Estate of S. C. McEachern, 507 Kennesaw Avenue, Marietta, Georgia

Occupation—Died Dec. 12, 1928

Income

Item and Instruction No.		
7.	Rents and Royalties. (From Schedule B)	$77.05
8.	Profit from Sale of Real Estate, Stock, Bonds, etc. (From Schedule C)	25,950.00
[fol. 34] 12.	Total Income in Items 1 to 11	$25,672.95

Deductions

Item and Instruction No.		
13.	Interest Paid	$2,050.00
14.	Taxes Paid. (Explain in *in* Schedule F)	1,529.62
19.	Total Deductions in Items 13 to 18	$3,579.62
20.	Net Income (Item 12 minus Item 19)	$22,093.33

Earned Income Credit

21.	Earned Income (not over $30,000)	$5,000.00
22.	Less Personal Exemption and Credit for Dependents	1,500.00
23.	Balance (Item 21 minus 22)	$3,500.00
24.	Amount taxable at 1½% (not over $4,000)	$3,500.00
27.	Normal Tax (1½% of Item 24)	$17.50
31.	Tax on Earned Net Income (total of Items 27 to 30)	$17.50
32.	Credit of 25% of Tax (not over 25% of Items 30, 44, 45 and 46)	$4.37

Computation of Tax

33.	Net Income (Item 20 above)	$22,093.33
37.	Less Personal Exemption	1,500.00
38.	Total of Items 34 to 37	$1,500.00
39.	Balance (Item 33 minus 38)	$20,593.33

[fol. 35]

40.	Amount taxable at 1½% (not over $4,000)	4,000.00
41.	Balance (Item 39 minus 40)	$16,593.33
42.	Amount taxable at 3% (not over $4,000)	4,000.00

Item and Instruction No.		
43.	Amount taxable at 5% (Item 41 minus Item 42)	$12,593.33
44.	Normal Tax (1½% of Item 40)	$20.00
45.	Normal Tax (3% of Item 42)	80.00
46.	Normal Tax (5% of Item 43)	503.73
47.	Surtax on Item 20 (see Instruction 23)	324.67
48.	Tax on Net Income (Total of Items 44 to 47)	$928.40
50.	Total of or difference between Items 48 and 49	$928.40
51.	Less Credit of 25% of Tax on Earned Income (Item 32)	4.37
52.	Total Tax (Item 50 minus 51)	$924.03
55.	Balance of Tax (Item 52 minus Items 53 and 54)	$924.03

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

D. W. McEachern, Adm.

Sworn to and subscribed to before me this 14th day of March, 1930. (Signature illegible.) Notarial Seal.)

[fol. 36]

Schedule B—Income from Rents and Royalties

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)
Brick Store—Marietta, Ga.....	$1,450.00	$15,000.00	$400.00	$350.00	$777.05	$77.05

Explanation of deductions claimed in Column 6.—Insurance, $452.30; Taxes, $324.75.

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

1. Kind of Property	2. Date Acquired	3. Amount Received	5. Cost or Value as of March 1, 1913, Whichever Greater	7. Net Profit (Enter as Item 8)
50 Sh. Ind. Life & H. Ins. Co.....	1918	$26,250.00	$500.00	$25,750.00

[fol. 37]

State how property was acquired.—Cash.

Schedule F—Explanation of Deductions Claimed in Items 1, 14, 16, 17 and 18

Taxes—Inheritance, Ga., $499.37; U. S., $124.85.
Taxes—State & Co., $623.45; Marietta, $217.20; Auto Tags, $64.75.
Total, $1,529.63

Explanation of Deduction for Depreciation Claimed in Schedules A and B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged off	
					6. Previous years	7. This year
Brick Store.....	1919	8 yrs.	30 yrs.	$12,000.00	$2,000.00	$400.00

[fol. 38] Individual Income Tax Return

For Net Incomes from Salaries or Wages of More Than $5,000 and Incomes from Business, Profession, Rents, or Sale of Property

For Calendar Year 1930

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1931.

Estate of S. C. McEachern, 507 Kennesaw Avenue, Marietta, Georgia

Occupation—Died Dec. 12, 1928

2. If you filed a return for 1929, to what Collector's office was it sent? Atlanta, Ga.

Income

Item and Instruction No.			
7.	Rents and Royalties. (From Schedule B)	$665.06	
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	33,250.00	
12.	Total Income in Items 1 to 11		$33,915.06

Deductions

13.	Interest Paid	$1,920.00	
14.	Taxes Paid. (Explain in Schedule F)	1,631.36	
16.	Bad Debts. (Explain in Schedule F)	1,389.79	

[fol. 39]

19.	Total Deduction in Items 13 to 18	$4,941.15
20.	Net Income (Item 12 minus Item 19)	$28,973.91

Earned Income Credit

Item and Instruction No.	
21. Earned Income (not over $30,000)	$5,000.00
22. Less Personal Exemption and Credit for Dependents	1,500.00
23. Balance (Item 21 minus 22)	$3,500.00
24. Amount taxable at 1½% (not over $4,000)	$3,500.00
27. Normal Tax (1½% of Item 24)	$52.50
31. Tax on Earned Net Income (total of Items 27 to 30)	$52.50
32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45 and 46)	$13.12

Computation of Tax

33. Net Income (Item 20 above)		$28,973.91
37. Less Personal Exemption	$1,500.00	
38. Total of Items 34 to 37		1,500.00
39. Balance (Item 33 minus 38)		$27,473.91
40. Amount taxable at 1½% (not over $4,000)		4,000.00
41. Balance (Item 39 minus 40)		$23,473.91
42. Amount taxable at 3% (not over $4,000)		4,000.00

[fol. 40]

43. Amount taxable at 5% (Item 41 minus 42)	$19,473.91
44. Normal Tax (1½% of Item 40)	$60.00
45. Normal Tax (3% of Item 42)	120.00
46. Normal Tax (5% of Item 43)	973.70
47. Surtax on Item 20 (see Instruction 23)	797.91
48. Tax on Net Income (total of Items 44 to 47)	$1,951.61

Item and Instruction No.		
50.	Total of or difference between Items 48 and 49	$1,951.61
52.	Total Tax (Item 50 minus 51)	$1,936.49
55.	Balance of Tax (Item 52 minus Items 53 and 54)	$1,936.49

Taxpayer's Record of Payments

Payment	Amount	Date	Check or M. O. No.	Bank or Office of Issue
Second	14 Willis Dobbs	March		D. W. McEachern, Admin. Marietta, Ga.

[fol. 41]

Schedule B—Income From Rents and Royalties

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)
Brick Store—Marietta, Ga.....	$1,430.00	$15,000.00	$378.00	.....	$386.94	$665.06

Explanation of deductions claimed in Column 6.—Taxes, $330.00; Water, $56.94.

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

1. Kind of Property	2. Date Acquired	3. Amount Realized	5. Cost or Value as of March 1, 1913, Whichever Greater	7. Net Profit (Enter as Item 8)
50 Sh. Ind. L. & H. Ins. Co.....	1918	$33,750.00	$500.00	$33,250.00

[fol. 42]

Schedule F—Explanation of Deductions Claimed in Items 1, 14, 16, 17 and 18

14—Taxes, City, State and County, on real estate and personal, $1,545.62—Ga. Income Tax, $85.74.
16—Notes, W. O. Beatner, endorsed by S. C. McEachern, paid by Estate—Uncollectible.

Explanation of Deduction for Depreciation Claimed in Schedules A and B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged off	
					6. Previous years	7. This year
Brick Store.....	1919	8 yrs.	30 yrs.	$12,600.00	$2,400.00	$378.00
Additional improvements 1929 of $600.00.						

[fol. 43] Individual Income Tax Return

For Net Incomes from Salaries or Wages of More than $5,000 and Incomes from Business, Profession, Rents, or Sale of Property

For Calendar Year 1931

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1932.

Estate of S. C. McEachern, 507 Kennesaw Avenue, Marietta, Georgia

2. If you filed a return for 1930, to what Collector's office was it sent? Atlanta, Ga.

Income

Item and Instruction No.			
7.	Rents and Royalties. (From Schedule B)	$73.95	
8.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	29,500.00	
12.	Total Income in Items 1 to 11		$29,426.05

Deductions

13.	Interest Paid	$1,220.00	
14.	Taxes Paid. (Explain in Schedule F)	1,426.31	
[fol. 44] 15.	Losses by Fire, Storm etc. (Explain in Table at foot of page 2)	100.00	
19.	Total Deductions in Items 13 to 18		$2,746.31
20.	Net Income (Item 12 minus Item 19)		$26,679.74

Computation of Tax

Item and Instruction No.		
33. Net Income (Item 20 above)		$26,679.74
37. Less Personal Exemption	$1,500.00	
38. Total of Items 34 to 37		$1,500.00
39. Balance (Item 33 minus 38)		$25,179.74
40. Amount taxable at 1½% (not over $4,000)		4,000.00
41. Balance (Item 39 minus 40)		$21,179.74
42. Amount taxable at 3% (not over $4,000)		4,000.00
43. Amount taxable at 5% (Item 41 minus 42)		$17,179.74
44. Normal Tax (1½% of Item 40)		$60.00
45. Normal Tax (3% of Item 42)		120.00
46. Normal Tax (5% of Item 43)		858.99
47. Surtax on Item 20 (see Instruction 23)		627.56
48. Tax on Net Income (total of Items 44 to 47)		$1,666.57
50. Total of or difference between Items 48 and 49		$1,666.57
52. Total Tax (Item 50 minus 51)		$1,666.57
[fol. 45] 55. Balance of Tax (Item 52 minus Items 53 and 54)		$1,666.57

Taxpayer's Record of Payments

Payment	Amount	Date	Check or M. O. No.	Bank or Office of Issue
Second.....	15 (Signature illegible)	March		Estate of S. C. McEachern By D. W. McEachern, Administrator, Marietta, Ga.

[fol. 46] Schedule B—Income from Rents and Royalties

1. Kind of Property	2. Amount Received	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Depreciation (Explain in table at foot of page)	5. Repairs	6. Other Expenses (Itemize below)	7. Net Profit (Enter as Item 7)
Brick Store—Marietta, Ga.....	$1,560.00.	$15,000.00	$420.00	$98.75	$1,115.20	$73.95

Explanation of deductions claimed in Column 6.—City & S. & Co. taxes, $322.50—Water, $56.70 Int., $336.00—Fire Ins., $400.90.

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

1. Kind of Property	2. Date Acquired	3. Amount Realized	5. Cost or Value as of March 1, 1913, Whichever Greater	7. Net Profit (Enter as Item 8)
50 Shs. Ind. L. & H. Ins. Co.....	1918	$30,000.00	$500.00	$29,500.00

[fol. 47] Schedule F—Explanation of Deductions Claimed in Items 1, 14, 16, 17 and 18

14—State & Co. $516.63—City $263.50 on real. & Per.—Ga. State Tax $646.16 on Inc. Total, $1,426.31.

Explanation of Deduction for Depreciation Claimed in Schedules A and B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	Amount of Depreciation Charged off	
					6. Previous years	7. This year
Brick Store.....	1919	8 yrs.	30 yrs.	$12,600.00	$2,778.00	$420.00

Explanation of Deduction for Losses by Fire, Storm, Etc., Claimed in Schedule A, and in Item 15

1. Kind of Property	7. Deductible Loss
Burglar broke down doors and damaged store. Cost of repairs.....	$100.00

[fol. 48] Amended Individual Income Tax Return

For Net Incomes from Salaries or Wages of More Than $5,000 and Incomes from Business, Profession, Rents, or Sale of Property

For Calendar Year 1931

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1932.

Estate of S. C. McEachern, 507 Kennesaw Avenue, Marietta, Georgia

2. If you filed a return for 1930, to what Collector's office was it sent? Alanta, Ga.

Income

Item and Instruction No.			
4.	Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source	$4,999.95	
7.	Rents and Royalties. (From Schedule B)	73.95	
12.	Total Income in Items 1 to 11		$4,926.00

Deductions

13.	Interest Paid	$1,220.00	
14.	Taxes Paid. (Explain in Schedule F)	1,426.31	
[fol. 49] 15.	Losses by Fire, Storm, etc. (Explain in Table at foot of page 2)	100.00	
19.	Total Deductions in Items 13 to 18		$2,746.31
20.	Net Income (Item 12 minus Item 19)		$2,179.69

Earned Income Credit

Item and Instruction No.		
21. Earned Income (not over $30,000)		$2,179.69
22. Less Personal Exemption and Credit for Dependents		1,500.00
23. Balance (Item 21 minus 22)		$679.69
24. Amount taxable at 1½% (not over $4,000)		$679.69
27. Normal Tax (1½% of Item 24)		$10.19
31. Tax on Earned Net Income (total of Items 27 to 30)		$10.19
32. Credit of 25% of Tax (not over 25% of Items 30, 44, 45 and 46)		$2.54

Computation of Tax

33. Net Income (Item 20 above)		$2,179.69
37. Less Personal Exemption	$1,500.00	
38. Total of Items 34 to 37		$1,500.00
39. Balance (Item 33 minus 38)		$679.69
40. Amount taxable at 1½% (not over $4,000)		679.69
[fol. 50] 44. Normal Tax (1½% of Item 40)		$10.19
48. Tax on Net Income (total of Items 44 to 47)		$10.19
51. Less Credit of 25% of Tax on Earned Income (Item 32)		2.54
52. Total Tax (Item 50 minus 51)		$7.65
53. Less Income Tax Paid at Source		1,249.95
Overpaid		$1,242.30

Affidavit

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by

me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

D. W. McEachern, Administrator of the Estate of S. C. McEachern, 704 Kennesaw Ave., Marietta, Ga.

Sworn to and subscribed before me this 8th day of December, 1932. Audrey Taylor, Notary Public. (Notarial Seal.)

[fol. 51] PLAINTIFF'S EXHIBIT No. 4

Stipulation

It is hereby stipulated by and between the parties to the above entitled cause, by their respective attorneys, that the following facts may be taken as true on the trial of said case, subject to the right of either party to object to any of the stipulated facts on grounds of irrelevancy or immateriality, and subject further to the right of either of the parties to introduce other and further evidence not inconsistent with any of the facts herein stipulated to be true.

1

On December 12, 1929, Plaintiff, as Administrator of the Estate of S. C. McEachern, Deceased, filed with the defendant, Collector of Internal Revenue at Atlanta, Georgia, the Federal Estate Tax Return required for said Estate. Said return was filed on the prescribed form furnished by the Treasury Department, namely, Form 706, revised January, 1929. The Federal Estate Tax shown to be due on said return was paid to said Collector on December 12, 1929.

2

Schedule C of said return as filed contained the following entry:

"Unpaid balance of deferred payments on 250 shares of stock of Industrial Life & Health Insurance Company under contract between S. C. McEachern and J. N. McEachern, as Trustee, dated September 3, 1924, $125,000.00."

[fol. 52] This amount of $125,000.00 was included in the gross estate on which estate tax was paid.

3

On the date of the death of S. C. McEachern, the unpaid installment obligations under the contract of September 3, 1924, a true copy of which is attached to the petition marked Exhibit A, were of a face value of $150,000.00, and had a fair market value of $125,000.00, and one-half of the 500 shares of stock in Industrial Life & Health Insurance Company covered by said contract, namely, 250 shares of said stock also had a fair market value of $125,000.00 on said date of the death of the said S. C. McEachern.

4

The fair market value on December 12, 1928 of the unpaid installment obligations described in paragraph 3 was the face amount of said obligations less a discount figured at 6.348% per annum from said date of death to the due date of each of said installments, and the valuation of $125,000.00 for the total of the obligations then outstanding was arrived at by deducting from the face amount of the entire unpaid obligations at said date of death the discount of 6.348% per annum from said date of death to the due date of each of the installments.

5

The total amount collected by Plaintiff in 1929 under the contract of September 3, 1924, copy of which is attached to the petition marked Exhibit A, was $26,250.00 the average collection date of which was seven and one-half months after the date of the death of said S. C. McEachern on December 12, 1928.

6

If the gain derived by said Estate of S. C. McEachern [fol. 53] from the collection in 1929 of said installment obligations in the face amount of $26,250.00, as described in paragraph 5, should be determined by deducting from the total amount of said collections in the sum of $26,250.00 the fair market value at the date of death of said S. C. McEachern of said obligations collected in 1929, the gain would be $952.49, and accordingly the tax would have been overpaid by the Plaintiff in the sum of $924.03, against which the statute of limitations had run at the time of the filing of the claim for refund on all except $230.07, which

said amount of $230.07 with interest from December 11, 1930 is the amount for which judgment should be given for the Plaintiff on the First Count, if Plaintiff is entitled to judgment. Nothing contained in this paragraph shall be taken as an admission by Defendant that Plaintiff is entitled to any judgment whatsoever. The above simply represents the correct figures upon which judgment may be based in the event Plaintiff is entitled to judgment.

7

In the income tax return for the Estate of S. C. McEachern for the year 1929 under the heading "Income," the following entry is found on line 8: "Profit from sale of real estate, stocks, and bonds, $25,750.00," and Schedule C of said return is as follows:

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.
(See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowable since Acquisition
50 Sh. Ind. Life & H. Ins. Co.	1918	$26,250.00	.....

[fol. 54]

5. Cost or Value as of Mar. 1, 1913 Whichever Greater	6. Subsequent Improvements	7. Net Profit (Enter as Item 8)	State how Property Was Acquired
$500.00	.....	$25,750.00	Cash

8

The only items of gross income as defined in Section 22 of the Revenue Act of 1928 received by or on behalf of said Estate of S. C. McEachern in the year 1929 were (a) an item of rents received amounting to $247.70 and (b) an item of gain derived from the collection in 1929 of installments in the sum of $26,250.00 under the contract of September 3, 1924, a copy of which is attached to the petition marked Exhibit A. No admission is made in this paragraph by either side as to the proper amount of gain or profit resulting from said collection in 1929.

9

The total amount collected by Plaintiff in 1930 under the contract of September 3, 1924, copy of which is attached to the petition marked Exhibit A, was $33,750.00, the average collection date of which was nineteen and one-half months after the date of the death of said S. C. McEachern on December 12, 1928.

10

If the gain derived by said Estate of S. C. McEachern from the collection in 1930 of said installment obligations in the face amount of $33,750.00, as described in paragraph 9, should be determined by deducting from the total amount of said collections in the sum of $33,750.00 the fair market value at the date of death of said S. C. McEachern of said obligations collected in 1930, the gain would be $3,333.32, and accordingly the tax would have been overpaid by the Plaintiff in the sum of $1,951.61, for which last mentioned [fol. 55] amount judgment should be given for the Plaintiff on the Second Count, if Plaintiff is entitled to judgment, together with interest at six per cent per annum on the following amounts from the following dates:

On $434.62 from March 16, 1931
On 434.62 from June 11, 1931
On 434.62 from September 11, 1931
On 647.75 from December 15, 1931

Nothing contained in this paragraph shall be taken as an admission by Defendant that Plaintiff is entitled to any judgment whatsoever. The above simply represents the correct figures upon which judgment may be based in the event Plaintiff is entitled to judgment.

11

In the income tax return for the Estate of S. C. McEachern for the year 1930 under the heading "Income," the following entry is found on Line 8: "Profit from Sale of Real Estate, Stocks, Bonds, etc., $33,250.00," and Schedule C of said return is as follows:

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.
(See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received
50 Sh. Ind. L. & H. Ins. Co.	1918	$33,750.00

4. Depreciation Allowable since Acquisition	5. Cost or Value as of Mar. 1913, Whichever Greater
.....	$500.00

[fol. 56]

6. Subsequent Improvements	7. Net Profit (Enter as Item 8)
.....	$33,250.00

12

The only items of gross income as defined in Section 22 of the Revenue Act of 1928 received by or on behalf of said Estate of S. C. McEachern in the year 1930 were (a) an item of rents received amounting to $995.06 and (b) an item of gain derived from the collection in 1930 of installments in the sum of $33,750.00 under the contract of September 3, 1924, a copy of which is attached to the petition marked Exhibit A. No admission is made in this paragraph by either side as to the proper amount of gain or profit resulting from said collection in 1930.

13

The total amount collected by Plaintiff in 1931 under the contract of September 3, 1924, copy of which is attached to the petition marked Exhibit A, was $30,000.00, the average collection date of which was thirty-one and one-half months after the date of the death of said S. C. McEachern on December 12, 1928.

14

If the gain derived by said estate of S. C. McEachern from the collection in 1931 of said installment obligations in the face amount of $30,000.00, as described in paragraph 13, should be determined by deducting from the total amount

of said collections in the sum of $30,000.00 the fair market value at the date of death of said S. C. McEachern of said obligations collected in 1931, the gain would be $4,999.95, and accordingly the tax would have been overpaid by the Plaintiff in the sum of $1,676.66, for which last mentioned [fol. 57] amount judgment should be given for the Plaintiff on the Third Count, if Plaintiff is entitled to judgment, together with interest at six percent per annum on the following amounts from the following dates:

On $401.20 from March 15, 1932
On 416.65 from June 17, 1932
On 416.65 from September 15, 1932
On 442.16 from June 12, 1933

Nothing contained in this paragraph shal be taken as an admission by Defendant that Plaintiff is entitled to any judgment whatsoever. The above simply represents the correct figures upon which judgment may be based in the event Plaintiff is entitled to judgment.

15

In the income tax return for the Estate of S. C. McEachern for the year 1931 under the heading "Income," the following entry is found on Line 8: "Profit from Sale of Real Estate, Stocks, Bonds, etc., $29,500.00," and Schedule C of said return is as follows:

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

1. Kind of Property	2. Date Acquired	3. Amount Received
50 Shs. Ind. L. & H. Ins. Co.	1918	$30,000.00

4. Depreciation Allowable since Acquisition	5. Cost or Value as of Mar. 1913, Whichever Greater
.....	$500.00

[fol. 58]

6. Subsequent Improvements	7. Net Profit (Enter as Item 8)
.....	$29,500.00

16

The only items of gross income as defined in Section 22 of the Revenue Act of 1928 received by or on behalf of said Estate of S. C. McEachern in the year 1931 were (a) an item of rents received amounting to $248.54 and (b) an item of gain derived from the collection in 1931 of installments in the sum of $30,000.00 under the contract of September 3, 1924, a copy of which is attached to the petition marked Exhibit A. No admission is made in this paragraph by either side as to the proper amount of gain or profit resulting from said collection in 1931.

17

Nothing herein contained shall be taken as a waiver by either party as to the right to costs.

In Witness Whereof the Attorneys of record of the parties hereof have hereunto set their hands this 10th day of April, 1935.

(Signed) W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff. Neil Andrews, Assistant United States Attorney; Edward P. Hodges, Special Assistant Attorney General, Attorneys for Defendant.

The following occurred after the stipulation was read by Mr. Sutherland:

[fol. 59] Mr. Hodges: I object to paragraphs Nos. 1 and 2 of the stipulation read by attorney for the Plaintiff on the ground that they are immaterial and irrelevant for the following reasons:

1. That which happened in regard to the estate tax return has no bearing on the case involved here, for the reason that estate tax returns and income tax returns are handled by separate and distinct units in the Bureau of Internal Revenue.

2. It was taxpayer's duty to make full and complete showing in his income tax return for 1928 of all income upon which tax was payable in that year.

3. The estate tax return cannot be considered as supplemental to the income tax return for the year of taxpayer's death or for any other year.

In regard to paragraph 8, which has just been read, and also paragraphs 12 and 16, the parties have agreed that, in so far as those paragraphs are in conflict with the returns that have just been introduced in evidence, that they shall be disregarded.

Mr. Sutherland: We agree to that, Your Honor.

The Court overruled the objections of the defendant to the admissibility of paragraphs 1 and 2 of the stipulation offered by the plaintiff and designated "Plaintiff's Exhibit 4." Said exhibit was received in evidence, whereupon the Defendant excepted to the ruling of the Court, and his exception was allowed.

The Plaintiff's evidence closed.

[fol. 60] Mr. Hodges: We offer in evidence the Defendant's stipulation designated as "Defendant's Exhibit A," which reads as follows:

DEFENDANT'S EXHIBIT A

Stipulation

It is hereby stipulated by and between the parties to the above entitled cause, by their respective attorneys, that the following facts may be taken as true on the trial of said case, subject to the right of either party to object to any of the stipulated facts on grounds of irrelevancy or immateriality, and subject further to the right of either of the parties to introduce other and further evidence not inconsistent with any of the facts herein stipulated to be true.

1

On March 12, 1929, Plaintiff as Administrator of the Estate of S. C. McEachern, Deceased, filed with the Collector of Internal Revenue at Atlanta, Georgia, an income tax return on behalf of said S. C. McEachern for the period January 1, 1928, to December 12, 1928. The income tax due according to said return was $1,441.70 which was paid to the Collector in the following amounts on the following dates:

March 12, 1929	$360.43
June 7, 1929	360.43
September 2, 1929	360.43
December 16, 1929	360.41

2

In the return described in paragraph 1 under the heading "Income," Line 6 is as follows: "Profit from sale of [fol. 61] Real Estate, Stocks, Bonds, Etc., $29,500.00," and Schedule C of said return is as follows:

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, Etc.

(See Instruction 6)

1. Kind of Property	2. Date Acquired	3. Amount Received
50 Shs. Ind. Life & H. Ins. Co.	1918	$30,000.00

4. Depreciation Allowable Since Acquisition	5. Cost	6. Value as of March 1, 1913
.....	$500.00	.....

7. Subsequent Improvements	8. Net Profit (Enter as Item 6)
.....	$29,500.00

3

In the return described in paragraph 1, Plaintiff did not include any gain or profit resulting from the transmission by death from the said S. C. McEachern, Deceased, to his estate of the installment obligations unpaid under the contract of September 3, 1924, a copy of which is attached to petition marked Exhibit "A." If Section 44 (d) of the Revenue Act of 1928 should be held constitutional and applicable for determining a gain on the transmission of the said unpaid installment obligations on the death of S. C. McEachern, then an additional tax in the sum of $11,625.00 would be due and unpaid by the Administrator of the Estate of S. C. McEachern on account of the income tax liability [fol. 62] of said S. C. McEachern for the period from January 1, 1928, to December 12, 1928; provided that the stock in Industrial Life & Health Insurance Company, covered by the contract above referred to had a basis of $10.00 per share in the hands of said S. C. McEachern. $10.00 per share is the basis used by S. C. McEachern in his returns for the years prior to 1928 and by the Administrator of S. C. McEachern in the return filed by him for said S. C. McEachern for 1928. Nothing in this paragraph shall be

taken as an admission that any gain or profit actually resulted from the transmission of said installment obligations by said S. C. McEachern upon his death.

In Witness Hereof the Attorneys of record of the parties hereof have hereunto set their hands this 10th day of April, 1935.

(Signed) W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff. Neil Andrews, Assistant United States Attorney; Edward P. Hodges, Special Assistant to the Attorney General, Attorneys for Defendant.

Mr. Brennan: If Your Honor please, we object to the introduction in evidence of all the facts set forth in that stipulation. We have admitted that they are true, but we do not think they are relevant and material, and we reserved the right to make that objection in signing the stipulation. The particular grounds as to relevancy and materiality [fol. 63] would be as follows: The income tax return filed for the defendant for the year in which he died, to-wit, 1928, can have nothing to do with Plaintiff's income tax liability for 1929, 1930 and 1931, which are the only years in this suit. * * * We contend, in support of our objections to the relevancy and materiality of the stipulation as offered by the Government, that their return, filed on behalf of the decedent for the period from January 1, 1928, to December 12, 1928, the date of his death, cannot serve as an element of estoppel against his estate, which is considered a different taxable entity. * * * As a further ground, we urge that this section 44d of the Revenue Act of 1928, under which the stipulation sets up an additional tax would be derived from the decedent for 1928 under certain circumstances, is not to be construed as applying retroactively and cover the transmission by death in 1928 of installment obligations under a contract of sale executed in 1924. * * * We further urge that if Section 44d of the 1928 Act should be construed as applying to the transmission of these obligations on the death of S. C. McEachern in 1928, then that section is unconstitutional. * * * Plaintiff objects further to the admission in evidence of each and every fact set forth in the stipulation offered by Defendant on the ground that all of said facts are offered solely in support of a defense of estoppel, a necessary and essential element of which is an alleged tax

liability against Plaintiff's intestate for the year of his death, namely, 1928, based upon Section 44d of the Revenue Act of 1928, which Plaintiff contends is unconstitutional for the following reasons:

1. No income can be said to result within the meaning of the Sixteenth Amendment to the Constitution to S. C. McEachern by reason of the transmission by his death of in-[fol. 64] stallment obligations held by him at the date of his death and Section 44d of the 1928 Act in attempting to impose a tax upon such supposed income is inconstitutional and void.

2. Section 44d of the 1928 Act undertakes to measure a gain to the vendor by the value of the deferred obligations at the time of their disposal or transmission, rather than as of the date of the sale. In many instances the value of installment obligations will have increased between the date of sale and the date of the death of the vendor, and in such cases Section 44d would, by its terms, tax this increase in value as a profit to the vendor for the last year of his life, although he received nothing from the disposition of the property. The Sixteenth Amendment does not authorize such a tax.

3. Section 44d is so arbitrary and unreasonably retroactive as to render it unconstitutional under the Fifth Amendment to the Constitution. In undertaking to apply that section in the present case, the Government seeks to impose a tax for 1928 either on a fictitious profit from the transmission of installment obligations by death, or upon a sale made in 1924, at a time when existing law made no provision for such a tax.

The Court stated that he would not pass upon the constitutionality of Section 44d of the Revenue Act of 1928, but he would sustain Plaintiff's objection to the introduction of Defendant's stipulation designated as "Exhibit A" in evidence, on the ground that the facts covered by the stipulation were irrelevant in that they undertook to support a defense of estoppel, and even though the stipulation were admitted, estoppel would not be established. Whereupon the Defendant excepted, and an exception was allowed.

The evidence for the Defendant closed.

[fol. 65] COLLOQUY

Mr. Sutherland: It is agreed between the parties that the estate tax return referred to in paragraph one of the stipulation offered by Plaintiff, was investigated with the usual care by Agent Pratt, in the office of the Internal Revenue Agent at Atlanta, and report of such investigation was made by said agent under date of May 31st, 1930, and transmitted to the Bureau in Washington on the same date.

Mr. Hodges: The defendant admits the truth of that statement, but objects on the same grounds as to paragraphs one and two of Plaintiff's stipulation designated as "Plaintiff's Exhibit 4," inasmuch as it was the duty of the taxpayer to make a full income tax return and not treat his estate tax return as being supplemental to his income tax return.

Mr. Sutherland: I understand there is no question about the good intention and good faith of everybody connected with these transactions in which these returns were prepared and filed throughout.

Mr. Hodges: Well, the Government will not contend that this was done maliciously.

The Court: What do you mean by "maliciously?" Do you mean to say that you agree that it was not done dishonestly and unfairly and was just merely incorrectly made because of not knowing the law as you know it?

[fol. 66] Mr. Hodges: That is right. In other words, we do not impugn his honesty.

The Court: All right, it was either a mistaken return, I mean from any sense that he intended to make a return that revealed the facts which he understood were proper to be revealed.

Mr. Hodges: Yes, sir.

The Court overruled the Defendant's objections and admitted the said oral stipulation in evidence, to which ruling and judgment of the Court the Defendant then excepted, and his exception was duly allowed.

Both sides closed.

Mr. Sutherland, for the Plaintiff, made a motion to direct a verdict in favor of the plaintiff.

Mr. Hodges, for the Government, made a motion to direct a verdict in favor of the Defendant, as follows:

"DEFENDANT'S MOTION FOR DIRECTED VERDICT

Now comes the defendant by its counsel in open Court immediately after the close of all the evidence in the case and moves the Court for a directed verdict in his favor for the following reasons:

1. That the pleadings and the evidence are legally insufficient to support any judgment in favor of the Plaintiff in the cause.

2. That under the pleadings and the evidence, the Plain-
[fol. 67] tiff is estopped to asserting a claim that any portion of the taxes in controversy in this action were not taxable to the estate of S. C. McEachern."

The Court then announced that he would sustain the Plaintiff's motion for a directed verdict, and would overrule Defendant's motion for a directed verdict, whereupon the Defendant excepted and his exception was allowed.

Thereupon the Court directed a verdict in favor of the Plaintiff, and overruled Defendant's motion for a directed verdict, and the jury returned the verdict in accordance with said direction. Thereupon the Defendant, in the presence of the jury, duly excepted to the verdict of the jury, and the exception was allowed.

Thereafter on to-wit, the 11th day of April, 1935, the Court duly entered a judgment and signed a certificate of probable cause therein, to which action by the Court the defendant excepted and his exceptions were allowed.

Thereafter, on the 6th day of May, 1935, the Defendant filed his motion for new trial, and the same was, after consideration thereof by the Court, overruled by the Court on the 16th day of May, 1935, to which judgment so overruling said motion the Defendant duly excepted, and his exception was allowed.

Thereafter, on the 20th day of June, 1935, upon the application of the Defendant and for good cause shown, the Court granted until the 1st day of September, 1935, within which Defendant should make and file a bill of exceptions in said cause.

The foregoing constitutes all the evidence and recites all the material proceedings upon the trial of said cause.

Now, in furtherance of justice and that right may be [fol. 68] done, the Defendant, J. T. Rose, Former Collector of Internal Revenue for the District of Georgia, presents the foregoing as and for his bill of exceptions in the above-entitled cause, and prays that the same may be settled, allowed, signed, and filed as such.

Lawrence S. Camp, United States Attorney; M. Neil Andrews, Asst. United States Attorney, Attorneys for Defendant.

In United States District Court

Stipulation as to Bill of Exceptions

The undersigned, Sutherland, Tuttle and Brennan, for and on behalf of the Plaintiff in the above-entitled cause, do hereby acknowledge service of the above and foregoing bill of exceptions this 22d day of August, 1935, and, having examined the same, do agree that the same is true and correct and that the same may be allowed, settled, signed and filed, and made a part of the record in said cause, and do hereby waive the right to be present at the settling and allowance of said bill of exceptions.

Sutherland, Tuttle & Brennan, Attorneys for Plaintiff.

In United States District Court

Order Settling Bill of Exceptions

Whereupon on the 26th day of August, 1935, upon due notice to said Plaintiff and within the time limited and granted by the Court therefor, the foregoing bill of exceptions is duly tendered by J. T. Rose, Former Collector of Internal Revenue for the District of Georgia, Defendant, [fol. 69] for signing, settlement and allowance as the bill of exceptions in said cause, and the said Plaintiff and Defendant having agreed that the same is true and correct;

It is Ordered that the above and foregoing be and the same is herewith duly signed, certified and allowed as the bill of exceptions in said cause, and as being true and correct, and the same is hereby made a part of the record in said cause and ordered filed as such.

Done this 26th day of August, 1935.

Wm. H. Barrett, United States District Judge Designate.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed August 14, 1935

To the Honorable William H. Barrett, United States Judge Designate:

Comes now on this 9th day of August, 1935, appellant J. T. Rose, former Collector of Internal Revenue, by his attorneys, Lawrence S. Camp, United States Attorney, and M. Neil Andrews, Assistant United States Attorney, and feeling aggrieved by the judgment of the Court made and entered in this case on the 11th day of April, 1935, does hereby appeal from said judgment to the Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceed-
[fol. 70] ings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, as by the rules in said Court in such cases made and provided.

Appellant further shows that this appeal is prosecuted under the direction and authority of the Attorney General of the United States of America, and therefore prays that said appeal may be allowed without bond.

Lawrence S. Camp, United States Attorney for the Northern District of Georgia. M. Neil Andrews, Assistant United States Attorney for the Northern District of Georgia.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed August 14, 1935

The foregoing petition considered, the appeal is allowed as prayed and the appeal, being prosecuted by direction of the Attorney General of the United States, it is ordered that the same be allowed without bond being given by the appellant.

It is further ordered that a supersedeas be granted, and pending a determination of this appeal, the judgment of the Court as of April 11, 1935, and the same is superseded.

This 10th, day of August, 1935.

Wm. H. Barrett, United States Judge Designate.

[fol. 71] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 14, 1935

Comes now, on this 9th day of August, 1935, the Defendant, J. T. Rose, former Collector of Internal Revenue, by his attorneys, Lawrence S. Camp, United States Attorney, and M. Neil Andrews, Assistant United States Attorney, and, in connection with his petition for appeal, files the following assignment of errors, upon which he will rely upon the prosecution of appeal from the judgment of this Court entered herein on the 11th day of April, 1935:

1

The Court erred in granting and allowing Plaintiff's motion for a directed verdict in favor of Plaintiff upon the grounds that under the law applied to the pleadings, the stipulation of facts, and the other evidence in the case, as a matter of law, such a verdict was demanded, which motion was made at the conclusion of all the evidence in the case, to which ruling of the Court Defendant then and there excepted and the exception was duly allowed by the Court.

2

The Court erred in granting and allowing the Plaintiff's motion for judgment upon the verdict theretofore made by the jury by direction of the Court and the signing and entering a judgment in favor of the Plaintiff for the amounts in said judgment set forth and to the granting of which motion and the signing and entering of which judgment the Defendant then and there excepted, and the Defendants' exceptions were duly allowed by the Court.

[fol. 72]

3

The Court erred in granting and allowing a certificate of probable cause, based upon the verdict and judgment theretofore rendered on the 11th day of April, 1935, in favor of the Plaintiff and against the Defendant, to which granting and allowance of said certificate of probable cause the Defendant then and there excepted, and his exceptions were duly allowed.

4

The Court erred in overruling and denying the Defendant's motion for a directed verdict in favor of the Defendant upon the grounds: (a) "That the pleadings of the evidence are legally insufficient to support any judgment in favor of the Plaintiff in the cause," and (b) "That under the pleadings and the evidence the Plaintiff is estopped to assert the claim that any portion of the taxes in controversy in this action were not taxable to the estate of S. C. McEachern," which motion was made at the conclusion of all the evidence in the case, to which ruling of the Court Defendant then and there excepted, and his exception was duly allowed by the Court.

5

The Court erred in admitting in evidence over objections of the Defendant, paragraphs 1 and 2 of the stipulation of facts offered by the Plaintiff, designated "Plaintiff's Exhibit 4," filed as part of the record in said cause, to which ruling of the Court the Defendant then excepted and an exception was duly allowed.

6

The Court erred in sustaining the Plaintiff's objection to the introduction of Defendant's stipulation marked "Defendant's Exhibit A" in evidence, on the ground that the facts covered by the stipulation were irrelevant in [fol. 73] that they undertook to support a defense of estoppel, and even though the stipulation were admitted, estoppel would not be established, and in excluding the Defendant's said stipulation from the evidence, to which ruling of the Court the Defendant then excepted and his exception was duly allowed.

Wherefore, the Defendant prays that the judgment of the Court upon the verdict be set aside and a new trial be granted.

Lawrence S. Camp, United States Attorney for the Northern District of Georgia. M. Neil Andrews, Assistant United States Attorney for the Northern District of Georgia.

IN UNITED STATES DISTRICT COURT

PRÆCIPE—Filed August 28, 1935

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Petition.
2. Answer.
3. Defendant's Motion for Directed Verdict.

[fol. 74] 4. Verdict and Judgment.

5. Bill of Exceptions.
6. Petition for Appeal.
7. Order granting Appeal.
8. Assignments of Error.
9. Præcipe.
10. Citation.
11. Clerk's certificate.

Lawrence S. Camp, United States Attorney; M. Neil Andrews, Assistant United States Attorney, Attorneys for Appellant.

Service of a copy of this præcipe acknowledged.
This 28th day of August, 1935.

Sutherland, Tuttle & Brennan, Attorneys for Appellee.

[fol. 75] Original citation omitted from the printed record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.

[fol. 76] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of October 6, 1936

No. 7911

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia,

versus

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased

On this day this cause was called, and, after argument by Edward P. Hodges, Esq., Special Assistant to the Attorney General, for appellant, and W. A. Sutherland, Esq., for appellee, was submitted to the Court.

[fol. 77] OPINION OF THE COURT—Filed November 9, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7911

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia, Appellant,

versus

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased, Appellee

Appeal from the District Court of the United States for the Northern District of Georgia

(November 9, 1936)

Before Sibley, Hutcheson, and Holmes, Circuit Judges

HUTCHESON, Circuit Judge:

The suit was to recover as overpayments taxes paid in 1929, 1930 and 1931. They were paid by appellee as ad-

ministrator of the estate of S. C. McEachern on account of collections of certain installment obligations held by the deceased at his death. Appellant, admitting that the amounts sued for had been in form erroneously paid, defended against paying them back on the ground that those amounts and more were due by plaintiff to the United States on ac- [fol. 78] count of those obligations, and that therefore "under the circumstances of the case, he was not obligated by the ties of natural justice and equity to refund the money."

In support of this position, he pointed out by answer and stipulation, that under Sec. 44(d) of the Revenue Act of 1928, the transmission by death of the unpaid installments should have been returned for the period from January 1, 1928 to December 12, 1928, and a tax of $11,625, an amount greatly in excess of the amount sued for, paid on account thereof. He insists that having failed to make such return, and having instead made incorrect and misleading returns as upon sales for each of those years, plaintiff may not now, limitation having barred the collection of the larger sum due the United States, get back the smaller sums paid on his incorrect returns.

The District Judge thought that these matters did not constitute an estoppel or otherwise operate to defeat the suit. He excluded the stipulation regarding them as irrelevant. The cause then standing solely on the stipulation that the sums sued for had been erroneously collected as taxes, he directed a verdict for plaintiff.

Appellant is here complaining of the overruling of his motion for a direction, of the direction of verdict for plaintiff, and of the ruling of the court excluding the stipulation. These are the facts as stipulated.

On September 3, 1924, S. C. McEachern the decedent, by a purchase contract sold 500 shares of the capital stock of the Industrial Life & Health Insurance Company for the sum of $300,000, $30,000 to be paid in cash, the balance in quarterly installments of $7,500 each, payable on March 1, 1925 and on the first day of each and every third month thereafter. The stock had cost him $10 a share, or $5000. [fol. 79] On December 12, 1928, with installments aggregating $150,000 still unpaid, he died intestate. On February 4, 1929 appellee was granted letters testamentary and qualified as administrator. For the years 1929, 30 and 31 he filed

estate income tax returns, reporting in each year as income, amounts equal to the profits on the installments collected in it, based on the original cost of the stock to decedent, and paid taxes accordingly. The returns, however, did not show these profits as derived from collections on installment obligations. Each showed a complete sale in that year of 50 shares. Plaintiff has made no return of the gain or profit received from the transmission of the installments. The only reference he ever made to these installments was in the Federal estate tax rturn to list among the assets of the estate, "unpaid balances of deferred payments on 250 shares of stock of the Industrial Life & Health Insurance Company under contract of S. C. McEachern to J. N. McEachern, as trustee, dated September 3, 1924, value $125,000." This value of $125,000 had been arrived at by discounting the face value of the $150,000 of future installment payments approximately 6.35% per annum from McEachern's death to the average due date of the installments.

Appellant insisted below and insists here, that appellee having based his returns upon a misstatement of fact, and having paid his taxes upon that misstatement, is now, limitation having run, estopped to correct it by showing that he did not sell 50 shares in each of those years as he reported he had done, but merely in each year collected some of the deferred instalment obligations. He cites in support cases holding that a taxpayer having asserted the existence of a state of facts and paid his taxes on that basis, though incorrect, may not thereafter, when limitation has run against collection on the correct basis, unsay what he has said to recover back the sums he has paid. Shamrock Oil Co. vs. Commr., 77 Fed. (2d) 555; Hartwell Mills vs. [fol. 80] Rose, 61 Fed. (2d) 441; Wheelock vs. Commr., 77 Fed. (2nd) 474; Swartz vs. Commr., 69 Fed. (2d) 633; Adler vs. Commr., 77 Fed. (2d) 733; Bothwell vs. Commr., 77 Fed. (2d) 35; Larkin vs. United States, 78 Fed. (2d) 951; Crane vs. Commr., 68 Fed. (2d) 640; Askin & Marine Co. vs. Commr., 66 Fed. (2d) 776; Stearns vs. United States, 291 U. S. 54.

He argues, too, that when the nature of the action plaintiff has brought is considered, it must be plain that plaintiff cannot recover in it. For to do so he must show not merely that defendant has obtained money from plaintiff

by one or another device which he was not entitled to employ, but that regardless of the method of its obtaining he withholds money from plaintiff which ex aequo et bono he may not justly withhold. J. W. Carter Music Co. vs. Bass, 20 Fed. (2d) 390; Champ Spring Co. vs. United States, 47 Fed. (2d) 1; Hartwell Mills vs. Rose, 61 Fed. (2d) 441; Lewis vs. Reynolds, 284 U. S. 281; Bull vs. United States, 295 U. S. 247.

Appellee replies that every element of estoppel is lacking here; that appellee did not misstate any fact with reference to the particular taxes collected, which has or could have misled any one. He argues further that from the statement in the estate tax return showing the installment obligations as assets of the estate, the Commissioner was charged with knowledge and did in fact know, that the administrator was under a mistake of law erroneously carrying forward the practice of the decedent in returning as income, gains on the installments as received. Finally, he argues that Sec. 44 (d) of the 1928 Act, the statute appellant invokes, is without force as unconstitutional.

We take up the last point first. No court which has [fol. 81] examined the statute has yet thought it unconstitutional.[1] We do not think it is. We regard as unsubstantial the difference appellee seeks to draw between the case of a sale made before and one made after the passage of the Act. It is true that in some of the cases notably Crane vs. Helvering, 76 Fed. (2d) 99, which dealt with installment sales made after the statute took effect, some piont is made of the volition of the seller in adopting the installment basis with knowledge of the existence of the statute. We agree, however with the views expressed in Lawler vs. Commr., 78 Fed. (2d) 567 and Moore vs. United States, 10 Fed. Supp. 143, that the time of the sale whether before or after the passage, is without substantial bearing on the validity of the Act.

We come then, to consider appellee's case as it really stands, the case of one who, though on a correct basis should

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Note 1: Crane vs. Helvering, 76 Fed. (2d) 99; Nuckolls vs. U. S., 76 Fed. (2d) 357; Lawler vs. Commr. 78 Fed. (2d) 567; Williams vs. Commr., 79 Fed. (2d) 518; Provident Trust Co. of Philadelphia vs. Commr., 76 Fed. (2d) 810; Moore vs. United States, 10 Fed. Supp. 143.

have paid considerably more as taxes on account of these installment obligations than he has paid on an incorrect basis, cannot, because of the course he has taken, limitation having now run, be made to pay on the correct basis. So considering it, we think it perfectly plain that though the sums he paid were paid on a particular theory of obligation which did not exist, he may not recover these sums back because they are in sum less than the amount which on a correct theory of obligation, he ought to have paid on account of these installment obligations. This is so not because of the existence of a technical estoppel or a waiver, but because his action was equitable in its nature and grounds, and he may not succeed in it unless he can show that the defendant has money which, ex aequo et bono, the defendant ought to refund.

[fol. 82] In Moses vs. McFarlane, 2 Burroughs, 1005, where the statement of the principle was first clearly announced, it is said:

"If the defendant be under an obligation from the ties of natural justice to refund, the law imposes a debt and gives an action founded on the equity of plaintiff's case, as it were, upon a contract quasi ex contractu, as the Roman law expresses it. This kind of equitable action to recover back money which ought not in justice to have been paid is very beneficial and therefore much encouraged. It lies only for money which ex aequo et bono the defendant ought to refund. It does not lie for money paid by plaintiff which is claimed of him as payable on a point of honor or honesty although it could not have been recovered from him through any course of law, as in the payment of a debt barred by the statute of limitation, or contracted during infancy, or to the extent of principal and legal interest upon a usurious contract, or for money lost at play, because in all these cases the defendant may defend with a safe conscience, though by positive law he is barred from recovery. In other words, the gist of this kind of action is that the defendant, under the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

While generally appropriate in efforts to get back money which is being wrongfully withheld, it is peculiarly appropriate in actions in fact between the taxpayer and the Government, though the suit is in form against the collector. Moore Ice Cream Co. vs. Rose, 289 U. S. 373. Sometimes

in these actions the inability to recover the money is spoken of as springing from estoppel; sometimes it is put on the more general ground of the inequities of the case. Grounded [fol. 83] in repugnance against unjust enrichment, the action is given wide and liberal application in all cases where money is wrongfully withheld. It may not be used to obtain money which the plaintiff ought not in good conscience, to have back.[2]

The judgment is reversed and the cause remanded for further and not inconsistent proceedings.

[fol. 84] JUDGMENT

Extract from the Minutes of November 9th, 1936

No. 7911

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia,

versus

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings.

Note 2: c/f United States vs. Jefferson Electric Co., 291 U. S. 386; United States Paper Co. vs. Bowers, 80 Fed. (2d) 82; Myers vs. Hurley, 273 U. S. 27; Richardson Lubricating Co. vs. Kinney, 168 N. E. 886; Perry vs. United States, 294 U. S. 330.

[fol. 85] MOTION AND ORDER STAYING MANDATE—Filed November 21, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 7911

J. T. ROSE, Former Collector of Internal Revenue, Appellant,

v.

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased, Appellee

Motion to Stay Issuance of Mandate

Now Comes D. W. McEachern, Administrator of the Estate of S. C. McEachern, deceased, appellee in the above entitled cause, and shows to this court that he intends to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment rendered by this court, and that he intends to make said application within three (3) months after the decision of this court on November 9, 1936.

Wherefore, appellee prays that the mandate of this court be stayed and withheld until February 9, 1937, or in the event that a petition for writ of certiorari is filed and docketed in the Supreme Court prior to the expiration of said time, then until final disposition of the cause in the Supreme Court.

This 18th day of November, 1936.

(Signed) W. A. Sutherland, Joseph B. Brennan, Attorneys for Appellee.

[fol. 86] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7911

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia, Appellant,

versus

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased, Appellee

On Consideration of the Application of the Appellee in the above numbered and entitled cause for a stay of the

mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 21st day of November, 1936.

(Signed) Rufus E. Foster, United States Circuit Judge.

[fol. 87] Motion and Order for Additional Stay of Mandate—Filed December 17, 1936

In the United States Circuit Court of Appeals for the Fifth Circuit

No. 7911

J. T. Rose, Former Collector of Internal Revenue, Appellant,

v.

D. W. McEachern, Administrator of the Estate of S. C. McEachern, Deceased, Appellee

Motion to Stay Issuance of Mandate

Now Comes D. W. McEachern, Administrator of the Estate of S. C. McEachern, deceased, appellee in the above entitled cause, and shows to this court that he intends to apply to the Supreme Court of the United States for a writ of certiorari to review the judgment rendered by this court on November 9, 1936, and appellee further shows that on

November 21, 1936, this court entered an order staying the issuance of its mandate for a period of thirty (30) days from November 21, 1936, and appellee further shows that additional time will be required to prepare a petition for certiorari and supporting brief.

Wherefore, appellee prays that the mandate of this court be further stayed and withheld until January 20, 1937, or in the event that a petition for writ of certiorari is filed and docketed in the Supreme Court prior to the expiration of [fol. 88] said time, then until the final disposition of the cause in the Supreme Court.

This 16th day of December, 1936.

(Signed) W. A. Sutherland, Joseph B. Brennan, Attorneys for Appellee.

[fol. 89] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 7911

J. T. ROSE, Former Collector of Internal Revenue for the District of Georgia, Appellant,

versus

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased, Appellee.

On Consideration of the Application of the Appellee in the above numbered and entitled cause for a further stay of the mandate of this court therein, to enable Appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is Ordered that the issue of the mandate of this court in said cause be and the same is further stayed for a period of thirty days; from December 21, 1936; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from December 21, 1936 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the

expiration of thirty days from December 21, 1936, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 17th day of December, 1936.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 90] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 76 to 89 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 7911, wherein J. T. Rose, former Collector of Internal Revenue for the District of Georgia, is appellant, and D. W. McEachern, Administrator of the Estate of S. C. McEachern, deceased, is appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 75 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of January, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 91] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. —

D. W. McEACHERN, Administrator of the Estate of S. C. McEachern, Deceased, Petitioner,

v.

J. T. ROSE, Former Collector of Internal Revenue

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the application of counsel for Petitioner in the above-entitled cause, and good cause therefor having been shown, it is now herein ordered that the time within which a petition for a writ of certiorari may be filed herein be and the same is hereby extended to and including February 24, 1937.

This 1st day of February, 1937.

Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States.

[fol. 92] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter W. A. Sutherland. File No. 41,290. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 6. D. W. McEachern, Administrator of the Estate of S. C. McEachern, Deceased, petitioner, vs. J. T. Rose, Former Collector of Internal Revenue for the District of Georgia. Petition for a writ of certiorari and exhibit thereto. Filed February 23, 1937. Term No. 6, O. T., 1937.